Case No. 15-1126 & 1168

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

On Appeal from the National Labor Relations Board

PETITIONER'S APPLICATION BY MOTION FOR ATTORNEYS' FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

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Midwest Terminals of Toledo International, Inc. ("Petitioner" or "Midwest") respectfully moves the upon Court for an Order awarding Midwest fees and costs of $138,530.77 based upon 681.25 hours of work performed in connection with this action, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.* (the "EAJA"), as the prevailing party in the above litigation. See, *Midwest Terminals of Toledo, International, Inc.,* 362 NLRB No. 67 (2015), vacated, *Midwest Terminals of Toledo International, Inc. v. NLRB,* July 14, 2017, D.C. Circuit Court of Appeals, Case No. 15-1126 Copy attached hereto as Exhibit 1 (ECF No. 1684157). Midwest includes in this request certain fees incurred in bringing this application by motion ("Motion") that have already been invoiced, and will file a supplemental request for additional fees incurred that have not yet been invoiced once briefing is concluded and fees are awarded.

Midwest meets each of the statutory requirements for an award of fees and expenses under the EAJA, such that the Court should award the requested attorneys' fees and expenses. See, 28 U.S.C. §2412(d)(1)(a). It is based on the points and authorities contained herein; the July 14, 2017 Judgment/Order in this action (Exhibit A to this Motion [ECF No. 1684157); the July 14, 2017 Mandate (Exhibit B to this Motion [ECF No. 1684158]; the Declaration of Alex Johnson ("Johnson Declaration") and all attachments thereto, Midwest's President (Exhibit C to this Motion); the Declaration of Ronald L. Mason ("Mason Declaration") and

all attachments thereto (Exhibit D to this Motion), Counsel for Midwest; and all of the pleadings, records, and papers filed in this action.

II. PROCEDURAL HISTORY

On May 6, 2015, Midwest filed a Petition for Review in this Court regarding the Board's March 31, 2015 Order denying Midwest's Appeal of ALJ Carissimi's November 12, 2013 decision.

Midwest was the Respondent in numerous unfair labor practice charges filed by Local 1982, International Longshoremen's Association ("Local 1982" or "union") and individual members of Local 1982 from December 2008 through February 2013. On May 3, 2013, the Regional Director issued an order consolidating all of the unfair labor practice cases for hearing. On March 12, 2013, and continuously thereafter, Midwest alleged as an Affirmative Defense that the Complaints issued in this matter were *ultra vires* because Acting General Counsel Lafe Solomon did not properly hold the position of General Counsel and, therefore, the Complaints should be dismissed. The Hearing was held before ALJ Mark Carissimi on June 10-14, 2013 and August 21, 2013. ALJ Carissimi issued his decision on November 12, 2013. The Board affirmed ALJ Carissimi's rulings, findings, and conclusions on March 31, 2015. Both ALJ Carissimi and the Board wholly disregarded Midwest's affirmative defense that were *ultra vires* because

Acting General Counsel Lafe Solomon did not properly hold the position of General Counsel.

On August 7, 2015, this Court dismissed the General Counsel's Complaint issued against SW General and vacated the Board's decision issued against SW General, determining that Acting General Counsel Lafe Solomon did not have the authority to issue the complaint in the matter therein and, as such the complaint was not valid. See, *NLRB v. SW General,* 796 F.3d 67 (D.C. Cir. 2015) *affr'd, NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017). Similarly, Midwest completely prevailed on the claims set forth in the Complaints when on July 14, 2017 this Court vacated the Board's March 31, 2015 decision because Acting General Counsel Lafe Solomon did not lawfully hold the position of General Counsel and, therefore, the Complaints against Midwest were invalid. See, Exhibit 1.

III. ARGUMENT

Midwest satisfies all the requirements for an award of attorneys' fees and costs under the EAJA. Midwest's claimed fees and expenses of $138,539.77 based on 681.25 hours of work are fair and reasonable, for all of the reasons described herein. Accordingly, the Court should award attorneys' fees and expenses to Midwest pursuant to the EAJA. See, 28 U.S.C. § 2412(d)(1)(a) ("[A] court shall award to a prevailing party other than the United States fees and other expenses.")

A. The Equal Access To Justice Act Applies to This Action

Under the EAJA, a court may award reasonable fees and expenses of attorneys to the prevailing party in any civil action brought against the United States or any agency thereof. See, 28 U.S.C. § 2412(b). "The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." Id. Moreover, the EAJA further provides in relevant part as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses…incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

See, 28 U.S.C. § 2412(d)(1)(A). The term "fees and other expenses" is defined to include "reasonable attorney fees." See, 28 U.S.C. § 2412(d)(2)(A). Therefore, the EAJA can be utilized in this action, because it is a proceeding for judicial review of agency action brought by Midwest against the National Labor Relations Board ("NLRB" or "Board"), an agency of the United States.

B. Midwest Is Eligible To Recover Fees Under the Equal Access To Justice Act

To be eligible for a fee award under the EAJA, a party-corporation must have had a net worth that did not exceed $7,000,000 at the time the action was filed, and must have had not more than 500 employees at the time the action was filed. See, 28 U.S.C. § 2412(d)(2)(B). The net worth calculation is based on subtracting total liabilities from total assets according to generally accepted accounting principles. See, e.g., *Kuhns v. Bd. of Governors of Fed. Reserve Sys.*, 930 F.2d 39, 41 (D.C. Cir. 1991).

Midwest is eligible for a fee award under the EAJA because, at the time this action was filed (including all the underlying unfair labor practices which were the subject of this Court's judicial review), Midwest had a net worth of less than $7,000,000 and had less than 500 employees, as verified by Midwest's President, Alex Johnson. See, Johnson Declaration, ¶¶ 3 [filed under seal].)

C. Midwest's Motion For Fees Is Timely Filed

A party seeking an award of fees under the EAJA must file an application within 30 days of final judgment. See, 28 U.S.C. § 2412(d)(1)(B). See also, *Melkonyan v. Sullivan*, 501 U.S. 89, 95 (1991). "Final judgment" is "a judgment that is final and not appealable…" See, 28 U.S.C. § 2412(d)(2)(G).

The Court issued its Judgment and Opinion in this case on July 14, 2017. (Exhibits 1-2.) The parties had forty-five (45) days to appeal within the D.C.

Circuit, which Midwest did on August 28, 2017. See, Petition for Rehearing and Rehearing En Banc, ECF No. 1690430. This Court denied the same on September 28, 2017. See, Per Curiam Order, ECF No. 1695230. The parties have ninety (90) days from September 28, 2017 to appeal to file a petition of certiorari in the U.S. Supreme Court, which ninety (90) days runs through December 27, 2017, at which point the Court's Judgment will become a "final judgment." See, 28 U.S.C. § 2412(d)(2)(G). See also, *Melkonyan*, 501 U.S. at 95; *Al-Harbi v. Immigration and Naturalization Serv.,* 284 F.3d 1080, 1083 (9th Cir. 2002); Fed. R. App. Proc. 40; D.C. Circuit Rule 35; D.C. Circuit Handbook of Practice and Internal Procedures, Sections XIII(B) and XIII(C) (as amended June 1, 2015); and Rule 13(3) of the Rules of the Supreme Court of the United States. This Motion is therefore timely submitted within thirty (30) days of the December 27, 2017 date that this Court's Judgment becomes final and not appealable (if neither party seeks relief from the U.S. Supreme Court). See, 28 U.S.C. § 2412(d)(2)(G).

D. Midwest Is The Prevailing Party In This Action

Under the EAJA, attorneys' fees are available to a "prevailing party" in the litigation. See, 28 U.S.C. § 2412(d)(1). A "prevailing party is one who has been awarded some relief by the court." See, *Buckhannon Bd. v. W. Va. Dept. of Health and Human Res.*, 532 U.S. 598, 603 (2001). This Court applies a three part test to determine whether a litigant is a prevailing party: "(1) there must be a court

ordered change in the legal relationship of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." See, *SecurityPoint Holdings, Inc., v. Trans. Sec. Admin.,* 836 F.3d 32, * 36 (D.C. Cir. 2016).

Midwest is the prevailing party because it has achieved at least "some of the benefit [it] sought in bringing suit." See, *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989). Midwest received the relief it sought because this Court vacated the Board's underlying decision, thereby denying enforcement of the Board's March 31, 2015 Order.

Midwest sought review of Board's Decision and Order in this Court maintaining that Board's Decision and Order was not supported by the law or statutory interpretation and enforcement should be denied." See, ECF No. 1, Petition for Review. Based upon its findings in *NLRB v. SW General,* 796 F.3d 67 (D.C. Cir. 2015) *affr'd, NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017) Midwest completely prevailed on the claims set forth in the First and Second Complaint when on July 14, 2017 this Court vacated the Board's March 31, 2015 decision because Acting General Counsel Lafe Solomon did lawfully hold the position of General Counsel, and, therefore, the against Midwest was invalid. Accordingly, the Court awarded Midwest its requested relief by granting its petition for review,

vacating the Board's Order, denying the NLRB's cross application for enforcement and remanding to the Board for further proceedings.

Accordingly, Midwest succeeded in achieving the benefit it sought in bringing the action; a judicial determination that Board's Order was unlawful and should be vacated. See, *Shalala v. Schaefer,* 509 U.S. 292, 300-02 (1993) (petitioner who secures a remand terminating the case and requiring further administrative proceedings in light of agency error is a prevailing party without regard to the outcome of the remand). See also, *SecurityPoint Holdings, Inc. v. Transp. Sec. Admin.,* 836 F.3d at * 38 (when court remands a case based on agency error without retaining jurisdiction, the case is terminated and the petitioner becomes a prevailing party irrespective to the outcome on remand); *Lundin v. Mecham*, 980 F.2d 1450, 1457- 59 (D.C. Cir. 1992) (Court determined plaintiffs were prevailing party entitled to legal fees, even though case was dismissed as moot after the agency capitulated to the plaintiffs' demands). The relief granted by the Court amounts to "actual relief on the merits of [the] claim." See, *Farrar v. Hobby*, 506 U.S. 103, 111 (1992).

E. The NLRB's Position Was Not Substantially Justified

Once a petitioner demonstrates that it is the prevailing party and alleges that the position of the United States (NLRB) was not substantially justified (and that no special circumstances make an award of fees unjust), the burden shifts to the

United States (NLRB) to affirmatively show that its position was substantially justified or that special circumstances make an award unjust. See, 28 U.S.C. §§ 2412(d)(1)(A)-(B). See also, *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000). In so doing, the NLRB must illustrate both the reasonableness of its litigation position and the agency's actions. See, *SecurityPoint,* at * 40. If the United States (NLRB) cannot carry its burden, Midwest is entitled to an award of attorneys' fees. Id.

Midwest asserts that the NLRB's position regarding its March 31, 2015 Order was not substantially justified and, further, that the NLRB's position in this action was not substantially justified. The NLRB cannot carry its burden of showing that its position in either matter was substantially justified. Specifically, the NLRB must establish that its position had a reasonable basis in both law and fact. See, *SecurityPoint,* at *39 (the underlying agency action and legal arguments in defense of that action must have "a reasonable basis both in law and fact") (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Notably, the NLRB must meet this burden in both instances; first by establishing that its position in the underlying agency action was substantially justified, and then again by demonstrating that its position defending its previous action in this proceeding was substantially justified. See, *Halverson v. Slater*, 206 F.3d at 1208.

Here, the NLRB refused for years to acknowledge that former Acting General Lafe Solomon unlawfully held the position of General Counsel from January 2011 through October 2013 necessarily rendering this entire litigation null and void. Midwest plead this affirmative defense as far back as March 12, 2013. Even when the D.C. Circuit Court of Appeals ruled as much in *S.W. General, Inc. v. NLRB*, 796 F.3rd 67 (D.C. Cir. 2015) and subsequently affirmed by the Supreme Court (137 S. Ct. 929, March 21, 2017), Counsel for the General Counsel ("Gen. Counsel") continued to litigate this matter. Gen. Counsel has obstinately refused to acknowledge Midwest's affirmative defense. Further, the Gen. Counsel continues to wholly disregard the holdings of the D.C. Circuit and the Supreme Court that Lafe Solomon did not properly hold the office of General Counsel. Gen. Counsel's position was not substantially justified and, therefore, an EAJA award is reasonable.

Midwest was forced to challenge each of the NLRB's Complaint allegations for over four years. Midwest had no choice but to continue to pursue its correct affirmative defense as it was consistently discounted by the agency at each and every level (Region 8, the ALJ and the Board). Midwest's affirmative defense was ultimately sustained by this Court, something this Agency was in a position to do on February 28, 2013 when Midwest plead Lafe Solomon's unlawful appointment as General Counsel as an affirmative defense.

Midwest has effectuated Congress' purpose by following the procedures set forth in the EAJA. For instance, one purpose of the EAJA is to enable small businesses as respondents an incentive to defend against arbitrary agency action. Midwest has served a public purpose and benefitted the development of the Labor Laws by contesting the General Counsel's unjustified action here. The legislative history indicates that Congress intended to encourage private parties to challenge governmental action. As such, an award of attorneys' fees justifies the very Congressional purpose for which the EAJA was enacted.

The NLRB's position is not supported by reasoned decision making. Accordingly, its position is without substantial justification, and it cannot carry its burden to demonstrate otherwise. Lastly, Midwest contends that there are no special circumstances that would make a fee award under the EAJA unjust, especially since Midwest has satisfied all the criteria for an award of fees under the EAJA.

F. The Requested Attorneys' Fees Are Fair And Reasonable

Midwest seeks reasonable attorneys' fees at the standard hourly rate set forth in the EAJA, adjusted for cost of living increases, in the total amount of $133,075.68 based on 681.25 hours of work. Midwest has sufficiently documented the request. It's supporting affidavits and itemized statements of time expended and itemized statements of expenses fulfill the statutory requirements. Midwest

has submitted a declaration which provides a daily accounting of the hours reasonably expended and tasks performed by its attorneys that worked on the case. This type of documentation has long been found to be adequate throughout the period of time since the EAJA was established. "[I]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." See, *National Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). "[N]o more is necessary than 'fairly definite information as to the hours devoted to various general activities, eg., pretrial discovery, settlement negotiation, and the hours spent by various classes of attorneys....'" See, *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc). Midwest's application for fees satisfies these requirements.

Additionally, Midwest is entitled to recover $5,455.69 in various costs and expenses claimed and clearly delineated in its itemized bills (March, May, July, September and October 2013). In *Laffey v. Northwest Airlines Inc.,* 572 F. Supp. 354, 382 (D.D.C. 1983), the court granted attorneys' out-of-pocket expenses, noting that "[a] number of courts have held that where attorneys' fees are authorized expressly by statute, recoverable litigation expenses are not limited to taxable costs."

Midwest's claim for attorneys' fees is based on the Lodestar formula, which is the number of hours reasonably expended on the litigation multiplied by a

reasonable hourly rate. See, *Copeland v. Marshall*, 641 F.2d at 891. The hours claimed in connection with this action are fair and reasonable in accordance with the Lodestar principles set forth in case law in light of the intricacy of the case, the work performed and the results obtained. Further, the hourly rates claimed by Midwest are fair and reasonable. Under the EAJA, the reasonable hourly rate is based on "prevailing market rates for the kind and quality of services furnished," except that the rate is ordinarily capped at $125 per hour, unless "an increase in the cost of living or a special factor…justifies a higher fee." See, 28 U.S.C. § 2412(d)(2)(A). An increase based on the cost of living, using the Consumer Price Index, validates an expansion of the standard statutory rate to an increase in fees ranging from $187.19 to $196.42 per hour over the course of four years (2013-2017) for which Midwest has sustained attorneys' fees related to this matter. See, *Haselwander v. McHugh*, 797 F.3d 1 (D.C. Cir. 2015). These rates are well below Mason Law Firm Company, LPA's actual billing rates, which have ranged from $225.00 to $370.00 per hour during the same time period.

1. <u>The hours claimed are fair and reasonable.</u>

The hours worked are fair and reasonable based on the work performed. Midwest's counsel, as of the filing of this Motion, has expended no less than 681.25 hours in connection with the litigation of the matter herein and invoiced to

Midwest. Applicant is seeking attorneys' fees, costs and expenses since July 12, 2012, its date of hire. See, Mason Declaration, ¶ 12.

Midwest was the Respondent in numerous unfair labor practice charges filed by Local 1982, International Longshoremen's Association ("Local 1982" or "union") and individual members of Local 1982 from December 2008 through February 2013. Mason Declaration, ¶¶ 15-18. On May 3, 2013, the Regional Director issued an order consolidating all of the unfair labor practice cases for hearing. Id. at ¶ 19. On March 12, 2013, and continuously thereafter, Midwest alleged as an Affirmative Defense that the Complaints issued in this matter were *ultra vires* because Acting General Counsel Lafe Solomon did not properly hold the position of General Counsel and, therefore, the Complaints should be dismissed. Id. at ¶ 20

Five (5) of the eight (8) unfair labor practice charges at issue were filed, investigated, defended by two (2) separate law firms and ultimately deemed by the Regional Director for Region 8 to have merit before Mason Law Firm was hired to represent Petitioner. Id. at ¶ 21. Accordingly, in order to adequately prepare for trial the undersigned and Mr. Tulencik had to review unfair labor practice case files and the evidence presented. Additionally, the undersigned and Mr. Tulencik also reviewed the case files of the all the unfair labor practice charges filed by both the union and individuals of members the union against Petitioner and those

charges filed by the Petitioner against the union in order to familiarize themselves with potentially helpful or harmful evidence or testimony presented in said cases which could be relevant to the issues being litigated in the administrative proceeding. Id. at ¶ 22.

The Hearing was held before ALJ Mark Carissimi on June 10-14, 2013 and August 21, 2013. During the 6 day hearing, twelve witnesses testified – some of which testified multiple times – and approximately 130 exhibits were introduced into evidence. Id. at ¶ 23. The transcript totaled just over 1,000 pages. Id. at ¶ 24. The post hearing brief to the ALJ required extensive analysis of the record to address each and every argument presented or inferred by the Acting General Counsel. Id. at ¶ 25. ALJ Carissimi issued his decision on November 12, 2013 and both the Petitioner and the Acting General Counsel filed Exceptions with the Board. The Exceptions again required extensive analysis of the record and ALJ Carissimi's decision to address each and every adverse ruling against Midwest as well as the reasoning applied by ALJ Carissimi to support his adverse rulings. Midwest submitted a total of three (3) briefs; Exceptions and Brief in Support, an Answering Brief to the General Counsel's Exceptions and Brief in Support and a Reply to the General Counsel's Answering Brief. Id. at ¶¶ 26- 27.

On March 31, 2015, the Board affirmed ALJ Carissimi's rulings, findings, and conclusions. Both ALJ Carissimi and the Board wholly disregarded

Midwest's affirmative defense that Complaint issued against Midwest was *ultra vires* because Acting General Counsel Lafe Solomon did not properly hold the position of General Counsel. Id. at ¶ 28 – 29. Accordingly, Mason Law Firm filed a timely appeal with this Court of the Board's March 31, 2015 decision. Id. at ¶ 29. Ultimately, this Court vacated the Board's March 31, 2015 decision because Midwest's aforementioned affirmative defense was deemed to have merit based upon this Court's ruling in *NLRB v. SW General,* 796 F.3d 67 (D.C. Cir. 2015) *affr'd, NLRB v. SW General, Inc.*, 137 S. Ct. 929 (2017).

2. Midwest is entitled to a cost of living adjustment.

Under the EAJA, the standard rate of $125 per hour may be adjusted to reflect an increase in the cost of living. See, 28 U.S.C. § 2412(d)(2)(A). See also, *Haselwander v. McHugh*, 797 F.3d at 3. The courts routinely approve cost-of-living adjustments. Notably, in 2004, this Court declared it had yet to deny one. See, *Role Models Am.*, 353 F.3d 962, 969 (D.C. Cir. 2004).

The cost-of-living-adjustment herein is obtained by using the Consumer Price Index For All Urban Consumers, U.S. City Average ("CPI-U") because there is no city specific cost of living data for Columbus, Ohio. See, *Conservation Force v. Salazar*, 916 F.Supp.2d 15, 26 (D.D.C. 2013). (Because there was no city-specific cost of living data, the court used the Bureau of Labor Statistics' Consumer Price Index for All Urban Consumers). The cost of living adjustment is

calculated by dividing the CPI-U for the year the services were rendered, by the baseline CPI-U in the year (March 1996 [155.7]) that Congress set the $125 per cap under the EAJA. See, *Haselwander,* at 3. See also, *Conservation Force v. Salazar,* 916 F.Supp.2d at 26. The resulting multiplier is then applied to the $125 statutory rate of for each of the years wherein billable work was performed. Id. See also, *Conservation Force* at 26.

Accordingly, Midwest requests that the hourly rate for its attorney be set at no less than $187.19 per hour for hours incurred in 2013; $188.14 per hour for hours incurred in 2014; $191.08 per hour for hours incurred 2015; $191.18 per for hours incurred in 2016; and $196.42 per for hours incurred in 2017 for a total of $133,075.08. See, Mason Declaration, ¶¶ 31-33.

3. The adjusted rates are fair and reasonable given prevailing rates in the relevant legal market.

The adjusted hourly rates Midwest seeks are reasonable in light of this Firm's actual rates ($225 to $370). A reasonable hourly rate is usually the prevailing market rate, which is defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record. See, *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). A firm's customary hourly rates are presumptively reasonable and reflective of prevailing market rates. See, *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 24-25 (D.C. Cir. 1984) ("For private law firms, the prevailing market rate for the firm's services is

presumptively found in the firm's customary billing rates."), *rev'd in part on other grounds,* 746 F.2d 4 (D.C. Cir. 1984). Likewise, courts in Mason Law Firm's "prevailing market" (Southern District of Ohio) consider an attorney's own normal billing rates to help calculate a reasonable fee. See, *Szeinbach v. Ohio State Univ.*, 2017 U.S. Dist. LEXIS 102091, *8 (S.D. Ohio 2017). See also, *Hines v. DeWitt*, 2016 U.S. Dist. LEXIS 59344, *8 (S.D. Ohio 2016) and *Schumaker v. A.K. Steel Corp. Ret. Accumulation Pension Plan*, 995 F. Supp.2d 835, 843 (S.D. Ohio 2014).

Courts in the Southern District of Ohio also rely upon state bar association guidelines and the 1983 Rubin Committee Rates (with a 4% COLA) to measure the reasonableness of the requested rates. See, *Hines v. Dewitt*, 2016 U.S. Dist. LEXIS 59344 at *7-8 and *Schumaker v. A.K. Steel Corp. Ret. Accumulation Pension Plan*, 995 F. Supp.2d 835 at 844. See also, *West v. A.K. Steel Corp. Ret. Accumulation Pension Plan*, 657 F.Supp.2d 914, 932 (S.D. Ohio 2009). The Rubin Committee, in relevant part, arrived at the following categories and hourly rates for 1983: Intermediate Partners (11 to 20 years of experience) – $ 113.43/hour; and Senior Partners (21 or more years of experience) – $ 128.34/hour. See, *West v. A.K. Steel Corp., Ret. Accumulation Pension Plan*, 657 F.Supp.2d 914 at 933, n4. The Rubin Committee rates, and the rates adjusted for 2013 through 2017, are as follows:

Experience	1983	2013	2014	2015	2016	2017[1]
11-20 years Mr. Tulencik	$113.43	$367.90	$382.61	$397.92	$413.84	$430.39
21+ years Mr. Mason	$128.34	$416.26	$432.91	$450.22	$486.23	$486.96

See, *Jones v. Sec'y of HHS*, 2016 U.S. Claims LEXIS 1409, *7 and *14, Table 1 (Fed. Cl., Sept. 1, 2016) (citing *West v. A.K. Steel Corp., Ret. Accumulation Pension Plan*, 657 F.Supp.2d at 932, n4) attached hereto as Ex. 5. In comparison, Mr. Tulencik and Mr. Mason's actual rates for 2013 through 2017 are as follows:

	2013	2014	2015	2016	2017
Mr. Tulencik	$225/245	$245	$245/255	$255/260	$265/270
Mr. Mason	$345	$345	$345/355	$355/360	$365/370

See, Mason Dec. ¶¶ 8 and 11. The adjusted EAJA rates claimed (ranging from $187.19 to $196.42 per hour) are considerably lower than both the actual rates charged by Mr. Mason and Mr. Tulencik and the prevailing market rates which would otherwise be deemed fair and reasonable as determined by the 1983 Rubin Committee Rates. Accordingly, the adjusted EAJA rates sought in the matter herein are necessarily fair and reasonable.

4. <u>Midwest is entitled to recovery of reasonable attorneys' fees and expenses totaling $138,530.77</u>

The chart below summarizes the claimed adjusted hourly rates, claimed hours, total fees claimed by year and totals costs in this action. These figures are

[1] The 2017 hourly rates were determined by multiplying the 2016 rate by the 4% COLA.

supported by the Mason Declaration and the actual billing statements reflecting the descriptions of services rendered and associated hours worked.

YEAR	ADJUSTED HOURLY RATE	HOURS WORKED	FEES CLAIMED
2013	$187.19 per hour	424.5	$79,462.16
2014	$188.14 per hour	104	$19,566.56
2015	$191.08 per hour	82	$15,668.56
2016	$191.18 per hour	1.75	$334.57
2017	$196.42 per hour	106.5	$18,043.23
Hearing Transcript			$3062.60
Witness Fees			$387.48
Lodging and Meals			$1438.21
Mileage			$442.40
Parking			$125.00
Total		681.25	$138,530.77

See, Mason Declaration, ¶¶ 31-36 & Ex.'s 1-3).

IV. CONCLUSION

Based upon all of the above, Midwest requests that pursuant to the EAJA, 28 U.S.C. § 2412 *et seq.* and, that it be at the awarded $138,530.77 in fees and expenses incurred on its behalf in prevailing in the above-entitled proceeding.

Respectfully submitted,

/s/ Ronald L. Mason

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system. I further certify that an original and three copies of the "Public Copy – Sealed Material Deleted" of this Motion and an original and three copies of the "Sealed Motion" were mailed to the Clerk of Court pursuant to the Court's rules.

Respectfully submitted,

/s/ Aaron Tulencik
Aaron Tulencik